1-0900-7766-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of an Assessment Issued
to REM-Osakis, Inc. on March 9, 1993.

ORDER ON MOTION
FOR SUMMARY JUDGMENT

By a written Motion filed on August 6, 1993, the Minnesota Department of Health (the "Department") moved for a recommendation for summary judgment in this matter. On September 1, 1993, REM-Osakis, Inc. (the "Respondent") filed a Memorandum in Opposition to the Motion. The Department filed a Reply Memorandum on September 20, 1993. On September 29, 1993, the Respondent filed its Reply Memorandum. The Motion was the subject of oral argument at the Office of Administrative Hearings on October 4, 1993, when the record closed.

The Department was represented by Mary L. Stanislav, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103-2106. Thomas Darling, Esq.; and Nancy Quattlebaum-Burke, Esq.; of the firm of Gray, Plant, Mooty, Mooty, and Bennett, P.A., 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota 55402, represented the Respondent.

Based upon the Memoranda filed by the parties, the oral argument, all of the filings in this case, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY RECOMMENDED: that the Commissioner of Health grant summary judgment in favor of the Department of Health.

Dated this _____ day of October, 1993.

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GEORGE A. BECK
Administrative Law Judge

MEMORANDUM

Summary disposition is the administrative equivalent of summary judgment. Summary disposition of a case is appropriate where there is no genuine issue as

to any material fact and one party is entitled to judgment as a matter of law. Minn. Rule, pt. 1400.5500 K; Minn.R.Civ.P. 56.03. A genuine issue is one which is not sham or frivolous and a material fact is a fact whose resolution will affect the result or outcome of the case. Highland_Chateau,_Inc._v._Minnesota Department_of_Public_Welfare, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984) rev. denied (Minn. Feb. 6, 1985) The initial burden is on the moving party to show facts that establish a prima facie case and assert that no genuine issues of fact remain for hearing. Theile_v._Stich, 425 N.W.2d 580, 583 (Minn. 1988). The non-moving party must then show that there are specific facts in dispute which have a bearing on the outcome of the case. Highland_Chateau, 356 N.W.2d at 808. General averments are not enough to meet the non-moving party's burden. Carlisle_v._City_of_Minneapolis, 437 N.W.2d 712, 715 (Minn. Ct. App. 1988). The non-moving party has the benefit of that view of the evidence which is most favorable to it. Greaton_v._Enich, 185 N.W.2d 876 (Minn. 1971).

The Respondent is a 13-bed facility for the mentally retarded located in Osakis, Minnesota. It is licensed by the Department of Health as a supervised living facility under Minn. Stat. Þ 144.50 and Minn. Rules, Ch. 4665. When a facility fails to comply with the standards set out in Minn. Rules, Ch. 4665, the Department issues a correction order which states the deficiency, cites the rule or statute violated, and specifies the time allowed for correction. Minn. Stat. Þ 144.653, subd. 5. A failure to correct the violation within the allotted time results, upon reinspection, in a mandatory penalty assessment. Minn. Stat. Þ 144.653, subd. 6. A fine schedule for supervised living facilities was adopted as a rule. Minn. Rules, pt. 4665.9000-4665.9100. Two Department surveyors conducted a biennial state licensing survey of the Respondent on July 14, 15, and 16, 1992. A surveyor reviewed the personnel fil

> The Licensee shall assure that:
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> > A. All staff shall, prior to employment and annually thereafter, show freedom from tuberculosis by a report of either a standard Mantoux tuberculin test or a chest X-ray. If the Mantoux test is positive or contraindicated, a chest X-ray shall be taken. The results of these tests shall be reported in writing and made a part of the staff member's personnel record;

The correction order issued to the Respondent was dated July 27, 1992 and set a time period for correction of 30 days. As a suggested method for correction, the Department suggested that the program director could develop a checklist for all new employees and, prior to their effective employment date, require that they provide a written report of the required test. The Department stated

that this report should be retained in the personnel file and be available for review.

In an affidavit, Ms. Meech states that she did indeed undergo a Mantoux tuberculin test in December of 1991. She states that the result of this test was negative and that it was reported in some unspecified fashion to the facility at some time prior to April 6, 1992, her date of employment. The Respondent states in its September 29, 1993 brief that Ms. Meech was previously employed by REM-Osakis beginning in December of 1991, when she received her Mantoux test. She then apparently left REM-Osakis in February of 1992 and returned in April of 1992. The facility does not contest the fact that no test was in Ms. Meech's personnel file at the time of the initial inspection. The Department was not advised of the December 1991 test until after this contested case proceeding was initiated.

The Department conducted a follow-up survey of the Respondent on February 22, 1993 to determine whether the Correction Orders issued as a result of the July 1992 survey had been corrected. The surveyor did not review the personnel file of Ms. Meech, which gave rise to the correction Order in July of 1992. The surveyor determined, however, that the facility had failed to correct the violation of Minn. Rule, pt. 4665.1200 A based upon her inspection of two other employee personnel files. Both employees had Mantoux test reports in their files. However, in the case of employee Julie Minor, who was hired on September 5, 1992, the date of the Mantoux test was September 21, 1992, subsequent to her employment. The parties disagree as to the date of Ms. Minor's first client contact at the facility. The Respondent alleges that it was September 14, 1992 while the Department contends that it was August 31, 1992. Employee Mary Ann Witt was hired on September 9, 1992. According to the facility her Mantoux test was performed on September 14, 1992 and read on September 17, 1992. Again the parties disagree as to the date of Ms. Witt's first client contact. The facility states that it was September 19, 1992 while the Department believes that it was September 9, 1992 The surveyor specifically asked the program director for the dates of first client contact.
The significance of the date of first client contact arises from the Department's apparent practice of overlooking violations of the rule if the Mantoux test report was in the personnel file prior to the date of the employee's first contact with a client.

The surveyor concluded that the violation of Minn. Rule, pt. 4665.1200 A, cited in July of 1992, had not been corrected since the personnel files of two employees did not contain a report of either a standard Mantoux test or a chest x-ray taken prior_to_their_effective_employment_date. On March 9, 1993 the Department issued a Notice of Assessment for Non-Compliance with Correction Orders to the Respondent which assessed a fine in the amount of $100. The amount of the fine is that specified by Minn. Rule, pt. 4665.9010 I. The facility submitted a timely request fo

The facility argued in its initial Memorandum that there are material factual disputes in this proceeding as to the date of first hire, the date of the Mantoux tests and the dates of first client contact, for both employee Minor and employee Witt. Based upon the statements made in the submissions, however, it appears now that the parties agree that Ms. Minor was hired on September 5, 1992 and that Ms. Witt was hired on September 9, 1992. The parties also agree that Ms. Minor had a Mantoux test on September 21, 1993 and that Ms. Witt had a test on September 14, 1992 which was apparently read on September 17, 1992. The parties do disagree on the date of first client contact for each employee. For Ms. Minor, the Department believes that date of first client contact was August 31, 1992 while the Respondent believes it was September 14, 1992. For Ms. Witt, the Department alleges that the first client contact was on September 9, 1992 while the facility contends that the date was September 19, 1992. The Department concedes that if the date of first client contact is material that there is a dispute between the parties in regard to employee Witt since the Mantoux test preceded the date on which the facility believes that the first client contact occurred. If the date of first client contact is not material, there is no factual dispute between the parties which would preclude resolution of this matter by summary judgment. As discussed below, the date of first client contact is not a material fact. The material fact under the rules is the date of first hire.1

The facility first argues that no uncorrected deficiency has been demonstrated in regard to the correction order finding no Mantoux test for Ms. Meech, because, upon reinspection, Ms. Meech's file was not reviewed and therefore the Department did not establish that the rule violation had not been corrected in her case. The Respondent argues that violation of the rule in other employee files upon reinspection constitutes a new violation rather than a failure to correct a prior one.

The statute provides that if a licensee has not corrected deficiencies specified in the correction order the licensee is subject to a fine. As the Respondent points out, what constitutes an uncorrected deficiency is not defined in rule or statute. However, the correction order advised the facility that in order comply in the future, it would have to comply with each element of Minn. Rule, pt. 4665.1200 A. Likewise, the suggested method for correction advised the program director that he should develop a checklist for new employees, requiring that they provide a written test report prior to their employment date. The correction order did not advise the Respondent that it simply had to place a Mantoux test in Ms. Meech's personnel file in order to correct the deficiency. The deficiency, then, is the failure to comply with the rule rather than the failure to have a test report in Ms. Meech's personnel file. The Respondent's interpretation would allow a facility to avoid a fine

and to continue to violate a rule unless the same exact fact pattern was found
both upon the initial inspection and at the reinspection. This cannot be the legislative intent behind the statutory scheme set out at Minn. Stat. Þ 144.653. Minn. Stat. Þ 645.17(1)and (5). The legislative intent must be that
the facilities must take steps to remedy rule violations so that the policy considerations underlying the rules are enforced.

The facility also points out that although Ms. Meech had no test result in her personnel file, upon reinspection both employees cited had test results
in their personnel file and therefore no violation has been shown. Again, in advancing this interpretation, the Respondent focuses on the particular facts of the two inspections rather than on compliance with the rule. In this case,
the rule has a single purpose, namely ensuring that staff is free of tuberculosis by having a written report in the pers

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1. For the purposes of this Motion, all of the relevant dates and other facts advanced by the Respondent are assumed to be true since it is the non-moving party.

At the time of the reinspection, the surveyors apparently sought information as to the date of first client contact in order to compare it to the date of the test. Although the Respondent objects to interpreting 4665.1200 A in any way other than its literal meaning as the unlawful adoption
of a new rule, it would be willing to concede that interpretation for the purposes of this contested case hearing. Respondent's Initial Memorandum p.14.
In its Reply Memorandum the Department states that its interpretation of the rule in question is that the test must be "prior to employment." That is in fact the standard set out in the correction order and the informational memorandum prepared subsequent to the reinspection. Therefore, there is no basis to conclude that the Department has created a "first client contact" rule
which ought to be applied in this proceeding. Nonetheless, even if the facts were measured by such a "rule", the client contact admitted by the facility on
September 14, 1992 for Ms. Minor was still prior to her Mantoux test on September 21, 1992.

It its written submissions the Respondent also advances an argument that
the personnel record requirement in Minn. Rule, pt. 4665.1200 A directly conflicts with both the Americans with Disabilities Act (ADA) and the Minnesota
Human Rights Act (MHRA). The facility contends that the ADA prohibits an employer from placing any medical related material in an employee's personnel

file. It argues that the MHRA also requires that medical condition or history be maintained in the separate medical files. In a prior order dated August 31, 1993 in this matter the Administrative Law Judge denied the Respondent's request for a stay of this proceeding due to its filing an action in federal district court. The Memorandum attached to that Order observed that while the administrative forum has expertise in the application of administrative rules and statutes, it is the federal court which has expertise in matters such as the Americans with Disabilities Act and constitutional questions. The Memorandum stated that since the Respondent had sought to avail itself of the expertise of the federal court, it made little sense to attempt to litigate those issues set out in the federal complaint in this administrative contested case proceeding. Nonetheless, the Respondent urges that even if ADA issues are not considered in this proceeding, the Administrative Law Judge should determine whether this rule violates the Minnesota Human Rights Act. It suggests that if the rule directly conflicts with the MHRA, the statute should take precedence over the rule and that administrative law judges should not enforce invalid rules.

The Respondent's arguments do not provide a persuasive basis for considering the matters set out in the federal lawsuit, in this contested case proceeding. The rule in question was properly adopted pursuant to the Administrative Procedure Act and therefore, under Minn. Stat. Þ 14.38, subd. 1 and 2, has the force and effect of law. Neither the Administrative Law Judge nor the Commissioner of Health has the authority to find that rule invalid either on constitutional grounds or the grounds that it conflicts with statute. Quam_v._State, 391 N.W.2d 803, 809 (Minn. 1986); Starkweather_v._Blair, 71 N.W.2d 869, 884 (Minn. 1955). The argument presented by the facility in its brief concerning whether freedom from tuberculosis is a bonafide occupational qualification for employment at a supervised living facility under the MHRA is a consideration that ought properly to be litigated in a proceeding under Chapter 363. Additionally, in this particular contested case proceeding no evidence has been advanced that the Respondent failed to comply with the rule because it was attempting to comply w or MHRA. In fact, most facility personnel files apparently contained Mantoux test reports. As the Department points out, there may be no "physical impossibility" in complying with the rule and the ADA and the MHRA if the facility were to keep Mantoux records in a medical file accessible to Department surveyors along with the personnel file. To the extent that the facility is concerned that it must make a record of the issues related to the ADA and the MHRA in this proceeding, it has done so in its briefs. However, it remains the opinion of the Administrative Law Judge that, based upon the principles of judicial economy and expertise, those matters should not be litigated in this contested case proceedings.

The Department is entitled to summary judgment in this matter. The

Respondent has failed to show any genuine issue as to any material fact. The dispute as to the date of first client contact is not one which would affect the outcome of the case since it is the date of first employment which is relevant under the rule. Furthermore, the Department has demonstrated that it is entitled to prevail as a matter of law. It is admitted that on the date of the first inspection employee Meech had no Mantoux test in her personnel file. Even though she had apparently taken a test in December of 1991, that alone does not comply with the rule which requires that it be in the staff member's personnel record, so that it can be verified by Department surveyors. Upon reinspection, the facility was again in violation of the rule in regard to two employees, both of whom had test results in their personnel record, but with the test results being subsequent to the date of employment, which again violates the rule in question. The facility argues that employee Minor was tested for tuberculosis when she worked at another facility which had closed in 1990. The test was apparently in December of 1988. However, it is admitted that no record of this test was kept at REM-Osakis and furthermore, another rule, to which the facility was subject under a waiver, establishes that the Mantoux test must be taken within 45 days prior to employment. Minn. Rule, pt. 1400.3000. Even apart from the 45-day rule, a 1988 test cannot reasonably be deemed to "prior to employment" in 1992. The record is therefore clear that Ms. Minor was hired on September 5, 1992 but did not have a Mantoux test until September 21, 1992, contrary to the rule. Additionally, Ms. Witt was hired on September 9, 1992 but did not have a Mantoux test until September 14, 1992. Since the Department has demonstrated a violation both upon the initial inspection and at the reinspection in February of 1993, an assessment of fine is appropriate. The $100 fine was properly selected from Minn. Rule, pt. 4665.9010 and its size appropriately reflects the recordkeeping nature of the violation. The Department is therefore entitled to a decision as a matter of law in this proceeding.

G.A.B.